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No. 83-498
83-573

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARTIN DANZIGER, et al.,
Appellants,

v.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL UNION LOCAL 54, et al.,
Appellees.

On Appeal From the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION AS *AMICUS CURIAE* FOR APPELLANTS

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January 10, 1984

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation respectfully moves for leave to file the annexed brief as amicus curiae in support of the appellants, and would show:

I. Interest of Amicus Curiae:

The National Right to Work Legal Defense Foundation is a nonprofit charitable organization formed to provide free legal aid to individual employees who suffer from acts of violence, intimidation,

harassment and coercion resulting from their decisions to refrain from union membership or activities. Additionally, the Foundation assists individual employees who seek to enforce their right to work, freedom of association and other fundamental liberties infringed by compulsory unionism arrangements.

II. Purpose of This Brief:

Individual casino employees have a grave interest in the outcome of this litigation. After a full and fair hearing, a neutral and detached state adjudicative body has decreed that Hotel & Restaurant Employees and Bartenders International Union Local 54, its president and certain officers have "organized crime associations". In accordance with the remedial provisions of N.J. Stat. Ann. 5:12-93, the New Jersey Casino Control Commission prohibited Local 54 from collecting dues from any employee licensed under the Casino Control Act and employed by a casino licensee.

Subsequently, the U.S. Court of Appeals for the Third Circuit held that New Jersey's prophylactic effort to rid the casinos and casino unions of organized crime figures and to protect employees was preempted by the National Labor Relations Act. If affirmed, the Third Circuit's interpretation of the preemption doctrine will:

(1) destroy the delicate balance between federal and state powers in the area of labor regulation in the casino industry;

(2) greatly diminish a state's power to control the infiltration of industries and unions by organized crime; and,

(3) require individual employees to financially support organized crime as a condition of maintaining their employment.

The Foundation does not doubt that appellants will fully argue their interests. However, because their briefs will naturally focus upon the legality of New Jersey's attempt to regulate and administer its casino operations, the Foundation submits that it will properly argue in favor of the interests of the individual employees affected by this decision.

For these reasons, the National Right To Work Legal Defense Foundation requests that this Motion be granted and the annexed brief accepted for filing.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of the amicus curiae is contained in the Motion For Leave To File this Brief and adopted herein.

INTRODUCTION OF ISSUES PRESENTED

In *Ellis v. Brotherhood of Railway, Airline and Steamship Clerks,* 82-1105 (U.S. Supreme Court cert. granted,

Apr. 18, 1983), this Court will soon face the issue of whether employees who pay a mandatory agency fee can be required to pay for a host of union sponsored political and social causes as a condition of employment. The issue in this case is even more extreme: whether a state is forbidden from protecting employees who are being required, as a condition of employment, to pay dues to a corrupt union, found by a neutral state adjudicative body to have direct links to organized crime.

Congress' relative silence on the particular issue of state regulation of unions involved in the casino industry should not be interpreted as giving organized criminals carte blanche. If the National Labor Relations Act will not protect employees in highly regulated industries from forced financial support of organized crime figures, at least the state which gave birth to the industry should be allowed to do so.

Finally, through the enactment of § 14(b) of the NLRA, 29 U.S.C. § 164(b), Congress has allowed states to impose conditions upon, or prohibitions against, a union's ability to require the payment of dues as a condition of employment. By stopping corrupt casino unions from receiving dues money, the New Jersey legislature is merely utilizing its recognized power under § 14(b).

ARGUMENT

Central to the resolution of this case is the determination of whether Congress intended to preempt New Jersey's regulation of labor unions in the casino industry. This question turns upon a balancing of the relative federal and state interests involved.

> "The question of whether regulation should be allowed because of the deeply rooted nature of the local interest involves a sensitive balancing of any harm to the regulatory scheme established by Congress, either in terms of negating the [NLRB's] exclusive jurisdiction or in terms of substantive rules, and the importance of the asserted cause of action to the state as a protection to its citizens."

Local 926, International Union of Operating Engineers v. Jones, U.S. , 103 S. Ct. 1453, 1458-9 (1983).

Although any balancing test should recognize that the federal labor policy favors the right of employees to freely choose their bargaining representatives, this policy has never been held to be absolute. In fact, both the Congress and this Court have recognized that where criminals or subversives hold power in a union, the employees' right to choose their representatives is not unfettered and should be curtailed. See 29 U.S.C. § 504 (1976); *DeVeau v. Braisted,* 363 U.S. 144 (1960); 5 U.S.C. § *7120.*[1]

[1] As part of the Civil Service Reform Act of 1978, Congress enacted the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§ 7101, et seq. In 5 U.S.C. § 7120, Congress established standards of conduct for labor unions representing federal employees. This section allows the Secretary of Labor to override the employees' choice of representative if there is evidence of corrupt or totalitarian influences in the union. Although the Federal Service Labor-Management Relations Statute differs from the NLRA, there is no doubt that the federal labor statute was patterned on the NLRA. Further, federal employees are guaranteed the right to choose their representatives in a manner similar to § 7 of the NLRA, 29 U.S.C. § 157. To the extent that the Federal Service Labor-Management Relations Statute is the most recent congressional declaration of national labor policy, it should be noted that by enacting 5 U.S.C. § 7120 Congress has clearly recognized limits on employees' organizational and representational rights where there are corrupt influences controlling the union.

In a plurality opinion upholding a bi-state regulatory scheme designed to weed out racketeers from the ports and terminals of New York, which was challenged on preemption grounds, Justice Frankfurter stated:

> "It would misconceive the constitutional doctrine of preemption . . . to decide this case mechanically on an absolute concept of free choice of representatives on the part of employees, heedless of the light Congress has shed for our guidance."

DeVeau v. Braisted, 363 U.S. 144, 153 (1960).

It does not overstate the present situation to argue that the interest of the State of New Jersey and individual casino employees is crucial, and far outweighs the interests asserted by Local 54. The State of New Jersey gave birth to the highly regulated business of casino gambling only after promising its citizens that stringent anti-crime measures would be taken to keep the casinos free of corrupt influences. Without the promise of these anti-crime measures, it is safe to say that the citizens of New Jersey would not have sanctioned casino gambling in their state. *Hotel and Restaurant Employees and Bartenders International Union Local 54 v. Danziger*, 536 F. Supp. 317, 321-323 (D. N.J. 1983).

It is well recognized by Congress that gambling should be subject to thorough regulation, if not completely outlawed. In fact, Congress has enacted a number of laws regulating

the interstate aspects of gambling.[2]

Similarly, states which have permitted casino gambling, lotteries or pari-mutuel betting have sought to place the strictest controls upon those activities. Thus, in *Nevada Tax Commission v. Hicks*, 73 Nev. 115, 210 P.2d 852, 854 (1957), the Nevada Supreme Court stated:

> "For gambling to take its place as a lawful enterprise in Nevada, it is not enough that this state has named it lawful. We have but offered it the opportunity for lawful existence. The offer is a risky one, not only for the people of this State, but for the entire nation. Organized crime must not be given refuge here through the legitimizing of one of its principal sources of income."

The citizens of New Jersey also recognized the risks involved in legitimizing casino gambling. Among the special protections which the New Jersey legislature mandated was to require that unions and individuals representing casino employees register with a state agency. Further, a neutral and detached state adjudicative body is empowered to investigate these unions and their officers and employees. Finally, as its major remedial power, the state agency can disqualify any corrupt union from receiving dues from employees.

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[2] See, e.g., 15 U.S.C. §§ 1171-1178 (1976) (barring interstate shipment of gambling devices); 18 U.S.C. §§ 1082-1083 (1976) (prohibiting gambling on certain ships); 18 U.S.C. § 1084 (1976) (barring transmission of wagering information over interstate wires); 18 U.S.C. §§ 1301-1307 (1976 & Supp. V 1981) (regulating lotteries); and 18 U.S.C. § 1953 (1976 & Supp. V 1981) (barring interstate shipment of gambling paraphernalia).

These remedial provisions of the New Jersey Casino Control Act are not "labor" legislation in the strict sense. These provisions are quasi-criminal anti-racketeering measures, enacted as part of a much larger scheme to regulate an industry which New Jersey voluntarily spawned, but could at any time again prohibit. Unlike the State of Florida's regulatory scheme struck down in *Hill v. Florida*, 325 U.S. 538 (1945), these New Jersey regulations are not directed at unions *per se*.

The New Jersey regulations do not directly interfere with Local 54's activities. They will not stop Local 54 or any other union from representing any employees, either inside or outside of casinos. Local 54 is still free to bargain on behalf of the employees it represents and to administer its contracts. Further, Local 54 can continue to collect dues from the many non-casino employees which it represents. Thus, the statutory sanction of disqualifying Local 54 from collecting dues from casino employees is really only a limited control, designed solely to further the interests of New Jersey and the individual casino employees who need protection from organized crime.

The NLRA gives Local 54 the power to negotiate a union security contract with employers. Thus, the National Labor Relations Act is being used, in effect, to require employees to financially contribute to organized crime affiliates as a condition of continued employment. Although nothing in the NLRA appears to prohibit this sordid situation on its face, there is no justifiable reason for believing that Congress meant to assent to this situation or deny New Jersey the power to police union corruption in a state created industry.

In fact, Congress has given states power to limit a union's collection of dues, through its enactment of § 14(b) of the

NLRA, 29 U.S.C. § 164(b). See *Retail Clerks International Association v. Schermerhorn*, 373 U.S. 746 (1963). The New Jersey laws at issue herein, and the Casino Control Commission's sanction, are analogous to other states' prohibitions against certain aspects of union security. *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301 (1949); Colo. Rev. Stat. § 8-3-108(1)(c) (1974) (invalidating union security agreement unless it has been approved by an affirmative vote of three-fourths of the employees in the bargaining unit); Thomas R. Haggard, Compulsory Unionism, the NLRB, and the Courts, 172-190 (1977). New Jersey has done nothing more than outlaw union security arrangements if its neutral adjudicative body determines that the union is corrupt. This regulation is within the spirit and the letter of § 14(b).

CONCLUSION

The opinion of this Court in *DeVeau v. Braisted*, the obvious federal labor policies against organized crime, the strength of New Jersey's interest, and the state's right to limit union security agreements should be interpreted to uphold the regulations which disqualify organized criminals from collecting dues from individuals employed in the casino industry.

Respectfully submitted,

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